No. 392.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased,

Defendant in Error.

Brief of Defendant in Error.

ALFRED A. FRASER,

Attorney for Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

Brief on Motion to Dismiss and Affirm.

The defendant in error, in support of his motion to dismiss the writ of error and affirm the judgment of the Circuit Court, assigns the following reasons therefor:

FIRST.

We claim that this is a proper motion and correct practice in this Court. We know of no case in this Court wherein this question has been passed upon, but we find that Rule 8 is as follows:– "The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."

Subdivision 5 of Rule 6 of the Supreme Court of the United States is as follows:

"There may be united with a motion to dismiss, a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this Court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

In the case of the City of Chanute vs. Trader, 132 Supreme Court Reports 67, Mr. Justice Blatchford, in the opinion of the Court, uses the following language:– "If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This Court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below."

SECOND.

The Court should dismiss the writ of error because there is no proper or legal bill of exceptions filed in this action. The record shows that the judgment in this action was rendered at the December term, 1896, of the Circuit Court at Boise City, Idaho, and that the bill of exceeptions was not presented to or signed by the judge until April 13th, 1897; this was after the adjournment of the the term at which judgment was rendered, and the judge had no authority to sign it. Laws 1st. session, 53d. Congress, chapter 9, provides:– "Sec. 6. That the terms of the District

Court for the District of the State of Idaho shall be held at Boise City, beginning on the first Monday in April and the first Monday in December."

Chapter 145, Laws 1892 provides:– "Sec. 2. That the Circuit Court of the United States in and for the State of Idaho shall be held at the times and places provided by law for the holding of the United States District Court in and for said district."

Therefore the bill of exceptions was improperly allowed and should be excluded from the record in this Court.

Missouri K. & T. Ry. Co. v Russell,
60 Fed. 501;

United States v Carr, 10 C. C. A. 80;

United States v Jones, 13 Sup. Ct. Rep. 840;

Miller v Ehlers, 91 U. S. 249;

Jones v Sewing Machine Co., 131 U. S., Append. 150;

Bank v Eldred, 143 U. S. 293;

Miller v Morgan, 14 C. C. A. 312.

By an inspection of said bill of exceptions the Court will find that it is not a proper one; it is nothing more than a transcript of the whole record of the proceedings in the lower court, containing all exhibits, depositions and other extraneous matters upon which no exception, objection or assignment of error is predicated;

Phosphate Co. v Cummer, 9 C. C. A. 279;

The Francis Wright, 105 U. S. 381;

Lincoln v Claflin, 7 Wall. 132;

City of Key West v Baer, 13 C. C. A. 572.

The said bill of exceptions is also a violation of Rule 10 of this Court.

FOURTH.

The record in this case shows that this writ of error was taken for delay and is absolutely without merit, and

therefore this motion should be granted and the judgment affirmed with damages as provided for in subdivision 2 of Rule 30 of this Court. The record shows that this action was tried by the Court without a jury, and the Court made a general finding in favor of the plaintiff in the Court below; there was no objection made to the admission or rejection of evidence, neither did the defendant ask an instruction in the nature of a demurrer to the evidence, that, on the proof offered, the plaintiff was not entitled to recover. Therefore there is nothing before this Court to review;

Pennywit v Eaton, 15 Wall. 382;

Martinton v Fairbanks, 112 U. S. 670;

Lehnen v Dickson, 148 U. S. 71;

Searcy County v Thompson, 13 C. C. A. 349;

O'Hara v Mobile & O. R. Co., 22 C. C. A. 512, citing many authorities;

Whitney v Cook, 99 U. S. 607.

This statement of the record brings us clearly within the law as declared in the following decisions, even if the Court overrules the motion as to the dismissal we are entitled to have the judgment affirmed;

Evans v Brown, 109 U. S. 180;

The S. C. Tryon, 105 U. S. 267;

Micas v Williams, 104 U. S. 556;

Swope v Leffingwell, 105 U. S. 3.

There is no assignment of errors in this case which can be considered by this Court. All the errors assigned are directed to the opinion of the Court or reasons for judgment contained therein and the law is well settled by repeated adjudicated cases of the United States Supreme Court and the several Circuit Courts of Appeal that error can not be predicated thereon;

British Queen Mining Co. v Baker Co., 139 U. S. 222;

Dickinson v Planters' Bank, 16 Wall. 250;

Lehnen v Dickson, 148 U. S. 71;

McFarlane v Golling et al., 22 C. C. A. 23;

Calverly v Deere, 15 C. C. A. 452;

Russell v Kern, 16 C. C. A. 154;

Adkins v W. & J. Sloane, 60 Fed. 344;

Same case on rehearing, 61 Fed. 791;

Bank of Commerce v First National Bank, 61 Fed. 809;

Kentucky Life & Accident Ins. Co. v Hamilton, 11 C, C. A. 42.

The opinion of the trial court is no part of the record;

England v Gebhardt, 112 U. S. 502.

Even if the Court could consider the opinion of the Court as a sufficient finding of fact within the statute as there was no objection made in the lower court to such findings, or to the judgment of the trial court based thereon and no request made in said court for a modification of said findings the point can not now be made for the first time in this Court;

Press v Davis et al., 54 Fed. 267.

The only objection made in the trial court was to the judgment and not to the findings if any there were. (See Transcript p. 76.)

For the reasons above stated, we contend that this motion should be sustained.

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Defendant in Error.

Brief of Defendant in Error.

This was an action on a policy of insurance issued by the plaintiff in error on the life of E. J. Curtis, deceased and by agreement of parties the cause was tried by the court without a jury, and the evidence in said cause was presented to the trial court in the form of an agreed statement as to the testimony to be presented for its consideration.

The first paragraph of the statement of the case set forth in the brief of counsel for plaintiff in error in regard to the incorporation of the defendant company, is not a correct statement in this, he cites the Court to the allegations of the answer to sustain his contention, when the agreed statement of facts in regard to the incorporation of said company is as follows: "That the defendant now is, and at all times

> hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the state of New York, and engaged in the business of writing life insurance, and making contracts, insuring the lives of its patrons, in the state of New York and in the the state of Idaho." (Transcript page 45.)

This statement in regard to the incorporation of the company is binding on this Court.

First, because the parties to this action have agreed to it.

Second, because the matter set up in the answer as to the act under which they claim the company is organized is denied by the plaintiff and no proof of such fact was offered in the trial court.

Section 4217, Revised Statutes of Idaho, 1887 is as follows:—"The statement of any new matter in the

answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

This action then involving questions of fact as well as of law was tried by the Court under the provisions of sections 649 and 700 of the Revised Statutes of the United States.

Section 649 is as follows:– "Issues of fact in civil cases in the Circuit Court may be tried and determined by the Court without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700:– "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be revised by the Supreme Court upon writ of error or upon appeal, and, when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

> Section 110 :– "There shall be no reversal in the Supreme Court or in any Circuit Court upon writ of error * * * * for any error of fact."

The writ of error in this case must be governed by the provisions of the statutes above set forth.

And our contention is, that under the construction placed upon these statutes by the Supreme Court of the United States and the different Circuit Courts of Appeal, there is no question before this Court for review. In this case the Court made a general finding and gave judgment for the plaintiff. During the progress of the cause there was no objection made or exception taken to the admission or rejection of evidence nor were there any rulings of the Court during the progress of the trial excepted to by the appellant. There was no request for a ruling upon the legal sufficiency or effect of the whole evidence, and there was no motion in arrest of judgment. Upon this record the judgment must be affirmed.

In one of the earliest cases construing these statutes Mr. Justice Bradley in the opinion of the Court uses the following language: "But as the law stands if the jury is waived, and the Court chooses to find generally for one side or the other, the losing party has no redress, on

error, except for the wrongful admission or rejection of evidence."

Dirst v Morris, 14 Wall. 484, 491;

Insurance Co. v Folsom, 18 Wall. 237;

And in the case of Cooper v Omohundro, 19 Wall. 65, 69, Mr. Justice Clifford delivering the opinion of the Court says: in reference to the case of Insurance Co. v Folsom *supra*, "Our decision in that case was, that in a case where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the Court in the progress of the trial, and the phrase, 'rulings of the Court in the progress of the trial,' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding."

The rule laid down in the above cases has never been departed from in any Federal Court as far as counsel has been able to find from a thorough examination of the question.

In the case of Martinton v Fairbanks, 112 U. S. 670 a case tried by the Court without a jury, we find in the opinion of the Court the following:– "In the present case

the bill of exceptions presents no ruling of the Court made in the progress of the trial and there is no special finding of facts. The general finding is conclusive of fact against the plaintiff in error, and there is no question of law presented by the record of which we can take cognizance.''

Again in Stanley v Supervisors of Albany, 121 U. S. 121, in the opinion of the court Mr. Justice Field says as follows:– ''Where a case is tried by the court without a jury, its findings on questions of fact are conclusive here. It matters not how convincing the argument that upon the evidence the findings should have been different.''

The following authorities are also directly in point on this question;

O'Hara v Mobile & O. R. Co., 22 C. C. A. 512;

Lehnen v Dickson, 148 U. S. 71;

Insurance Co. v Unsell, 144 U. S. 439;

On rehearing, Adkins v W. & J. Sloane, 10 C. C. A. 69;

Walker v Miller, 8 C. C. A. 331, citing nearly all the cases;

Distilling & Cattle Feeding Co. v Gottschalk Co., 13 C. C. A. 618;

Village of Alexandria v Stabler, 13 C. C. A. 616.

In the case of Searcy County v Thompson, 13 C. C. A. 349, the court construing the above statutes cites nearly all the cases on this question and in the opinion says:– "No exceptions were taken in the course of the trial, either to the admission or exclusion of testimony. Neither did the defendant ask an instruction in the nature of a demurrer to the evidence, that, on the proof offered the plaintiff was not entitled to recover. Such being the condition of the record, we are confronted at the outset with the inquiry whether the record presents any question which this court can review." And the court held there was not any. The record in the above case is identical with the one at bar.

The next question that presents itself for consideration, is, can the agreed statement of facts in this case be taken as the equivalent of a special finding of facts within the purview of the statute? This question has been answered in the negative in the case of Kentucky Life & Accident Insurance Co. v Hamilton, 11 C. C. A. 46 (on rehearing,) a case identical with the one at bar.

In the above case in the opinion of the court we find the following language: "But the so--called" agreed statement of facts does not purport to be a statement of the ultimate facts, but a mere agreement as to the evidence to be submitted to the court as bearing upon the issues presented by the pleadings. To treat the evidence thus submitted as an agreed statement of facts, equivalent to a

special finding of facts, would require this court on a writ of error, to examine the evidence as it was submitted to the court below, and confound all the distinctions which distinguish an appeal from a writ of error. The bill of exceptions sets out the numerous applications, notices, letters, policies, charters and by-laws therein referred to as having been read upon the hearing. What ultimate facts are proven by all this evidence is not stated in the agreement itself, nor is there any special finding of facts based upon all this evidence by the trial judge. An agreed statement of facts, which will be accepted as the equivalent of a special finding of facts, must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found, is not within the rule stated in Supervisors v Kennicott, *supra.*

In Raimond v Terribonne parish, 132 U. S. 192, a like question arose as to the sufficiency of a so-called agreed statement of facts, in regard to which the court said:– "The so-called statement of facts is mainly a re-

> capitulation of evidence introduced by the parties at the trial."

See also,–

Minor v Tollotson, 2 How. 392,

Campbell v Boyreau, 21 How. 223,

Bond v Bustin, 112 U. S. 606.

Again in considering the assignments of error in this case I call the court's attention to the fact that assignments Nos. 1, 2, 3, 6, 8, 9 and 10. pages 2 to 5 inclusive, of Transcript are predicated upon the *opinion* of the trial court and can not be considered upon writ of error. In support of the above proposition I call the court's attention to the cases cited by counsel on page . .25. . of this brief.

All of the errors assigned by appellant, Nos. 1, 2, 3, 6, 8, 9 and 10 (if said errors can be considered) are based on the fact that the court applied the laws of the state of New York of 1876 as amended in 1877 to the defendant company. This question is now raised for the first time in this court by the appellant; in the trial court the appellant introduced evidence that the company had complied with the above laws, see the deposition of Bennett W. F. Amsden, page 50 of Transcript.

Appellant also now for the first time claims that they are not subject to the general insurance laws of New York, but only governed by Chapter 175 of the Laws of 1883 of New York.

Even if the above contention be true, it is now too late to raise the question in this court.

Where a party relies upon the provisions of a partic-

ular statute as a defense to a cause of action he must call the attention of the trial court to that statute;

City of Findlay v Pertz, 20 C. C. A. 662.

We contend that this policy is governed by the provisions of the laws of New York relating to the forfeiture of life insurance policies. Laws of New York 1877, Chapter 321, as follows:–

"No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or to the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a

duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

If under the above statute there is a question as to whether or not its terms applied to this company, that doubt is entirely removed by Laws of New York 1885, Chapter 328, which is as follows:– Sec. 1, "Chapter 341 of the Laws of 1876 (amended by Act of 1877 above set forth,) entitled 'an Act regulating the forfeiture of Life Insurance policies' shall not apply to policies issued

upon monthly or weekly installments of premiums, provided the notices therein mentioned shall be waived in the application for such policies or in the additions to such applications."

This statute by naming the policies the above statute does not apply to, thereby, by implication of law and statutory construction it does apply to all others not excluded.

There is no contention here that this policy was issued on monthly or weekly installments of premiums, and if it was they do not claim that the notices required by the statute has been waived in the application for said policy.

In the case of Jacklin v National Life Ass'n., 24 N. Y. S. 746 the court held that the above statute applied to all life insurance companies except those excluded by the act of 1885 above set forth, and in that case the court refused to follow the dictum contained in the decision of the court in the case of Ronald v Mutual Reserve Fund Life Association, 132 N. Y. 378 (which is the only case relied upon by counsel for the defendant in error as sustaining his contention that the statute does not apply to the defendant company,) for the reason that the statute of 1885 was not called to the attention of the court in the Ronald case.

The Court of Appeals of New York in the case of McDougall v Provident Savings Life Assurance Soc., 32 N. E. 251 on this question uses the following language:–

> "Upon the construction of this statute the appellant's counsel have made an elaborate argument to the effect that it can not be applicable to this kind of a contract. * * * * * We should hesitate to call in question the applicability of the statute to any class of life insurance policies. It was intended to, and undoubtedly does, subserve a useful purpose, in throwing about the contract between insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured."

The notice of forfeiture provided for in the statute must be given the assured, and unless it is given the policy is in full force and effect no matter how long or how much the assured may be delinquent in his payments. The giving of the notice is a condition precedent to the right of the company to declare a forfeiture.

Provident Savings Life Assurance Soc. v Nixon, 73 Fed. 144;

Phinney v Mutual Life Ins. Co., 67 Fed. 499;

Griffith v New York Life Ins. Co., 36 Pac. 113;

Griesemer v The Mutual Life Ins. Co., 10 Wash. 202;

Baxter v Brooklyn Life Ins. Co., 119 N. Y. 450;

Phelan v Insurance Co., 113 N. Y. 147;

Carter v Insurance Co., 110 N. Y. 15.

The notices provided for in the statute can not be waived by any provision to that effect in the policy;

Phinney v Mutual Life Ins. Co., 67 Fed. 499;

Griffith v New York Life Ins. Co., 36 Pac. 113;

Warner v National Life Ass'n., 58 N. W. 667.

The judgment is right even if notice was mailed in time, as the notice does not conform to the statute.

The notice requires the assured to pay the premium "within thirty days from the *date* of this notice," (Transcript page 55,) whereas the statute requires it to be paid within a certain time after "the *mailing* of said notice. The date of the notice is of no consequence at all.

The case of Phelan v Insurance Company, 113 New York 147 is directly in point on this question.

Again, the statute requires the notice to state the date when the premium is due. The notice in this case states it is *now* due (June 1st, 1893,) (Transcript page 255,) when in truth and in fact it was not due until July 1st, 1893, as

admitted in 7th paragraph of defendant's answer, (Transcript page 34,) and stipulation of facts (Transcript page 48.)

There is no testimony as to the date of the mailing of said notice except the deposition of Bennett W. T. Amsden, and his testimony is entirely heresay as shown by his evidence (Transcript page 52,) and admitted over objection of plaintiff, (Transcript page 48.) That this is not a sufficient showing in regard to the mailing of the notice has been decided by this Court in the case of the Provident Savings Life Assurance Association v Nixon, 73 Fed. 144.

Specifications of error need not be considered, because they are aimed at the opinion of the court and not at the decree rendered.

McFarlane v Golling *et al.*, 22 C. C. A. 23;

Calverly v Deere, 13 C. C. A. 452;

Russell v Kern, 69 Fed. 94; 16 C. C. 154;

British Queen Mining Co. v Baker Silver Mining Co., 11 Sup. Court Rep. 523, 139 U. S. 222;

Dickinson v Planters' Bank, 16 Wall. 250;

Lehnen v Dickson, 13 Supreme Court Rep. 481, 11 C. C. A. 42;

Adkins v W. & J. Sloane, 60 Fed. 344, (good case;)
On Rehearing, 61 Fed. 791;

National Bank of Commerce v First National Bank, 61 Fed. 80).

There was no objection to the findings or judgment in this case when made by the trial court and they can not be now considered for the first time.

Press v Davis *et al.*, 54 Fed. 267.

The counsel for defendant in error has taken up considerable portion of his brief contending that the notice in evidence in this case was given in time; in reply to this contention I content myself by citing this Court to the case of Hicks et al. v National Life Ins. Co., 60 Fed. 690, a case decided in the Circuit Court of Appeals, Second Circuit, sitting in the District of New York and construing this statute, in the above case the notice was mailed on the 2d. day of November and informed the assured that he must pay his premium on December 2d., and the court held this was only twenty-nine days' notice and that the defendant was in no better position than it would be if no notice had been mailed. The above case is identical with the one at bar and this Court to hold that the notice in this case was mailed "at least thirty days prior to the day when the premium is payable," must overrule the above court construing the statutes of its own circuit.

For the reasons above stated we contend that the judgment of the trial court was correct and ought to be affirmed.

Respectfully submitted,

ALFRED A. FRASER,

Attorney for Defendant in Error.